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Access to Justice for Collective and Diffuse Rights: Theoretical Challenges and Opportunities for Social Contract Theory

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Thinkers central to the formulation of contract theory in the Western political tradition, notably Hobbes and Locke,[1] articulated their theories in worlds marked by immense political and social strife. Accordingly, their theories seek to address the ordering of political and social conflict through the act of entering into civil society by agreement—by contract, that is. Both writers, despite their considerable differences, focus heavily on exploring the ideal relation between sovereign and subject in a well-functioning civil society. As such, their theories dedicate a great deal of time and energy to understanding and defining the proper relation of the individual and the state. This is unsurprising given the context in which they were working. Both men, despite considerable differences in time, temperament, and point of view, were interested to understand the conditions under which an individual could be compelled to pledge obedience to the sovereign—the sole state power of their era.

The social contract underpinning the relationship between individual and sovereign thus was understood by each philosopher to require that an individual sacrifice their liberty in the state of nature to enjoy the benefits of civil society membership. As a result, at the heart of classical contract theory exists a contradiction. On the one hand, a republic is formed by and of many individuals in the service of their collective protection and wellbeing. On the other hand, this collective drive to act so as to protect the common-wealth focuses

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1. At the outset, I need explain citations to their work, and notably in the case of Hobbes, for his masterwork, *Leviathan* and for Locke the *Two Treatises of Government.* The formatting and even some of the language changes from edition to edition. The ordering, however, does not. Therefore, for ease of reference, I provide the chapter and (in the case of Locke) section numbers as well as the page numbers for the editions I used. In this way, any reader will be able to identify the cites passages. In both cases, I follow the orthography of the editions I used.

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disproportionately on the role of individual members of civil society qua individuals.

This way of conceiving the challenges of effective political organization has consequences for understanding what sorts of claims may be vindicated in a well-functioning civil society and how. To put the point in anachronistic terms, the focus Hobbes and Locke give to civil society organization has consequences for what sorts of access to justice their theories contemplate. Thus, the contract theories identified with thinkers like Hobbes and Locke contemplate the resolution of disputes in which an individual is deprived of a right (such as the freedom to contract) by another. That individual's recourse is then to protest the deprivation of the right to an impartial third party (provided for and by the sovereign authority). In other words, the standard model assumes a direct cause-and-effect of harm suffered—vindication of the right. Civil society is thus conceived to exist to arbitrate conflicts between individuals, not between groups, or between an individual and a group. This is not to say that the theory prohibits the application of its logic to inter-group conflicts, but that is not the focus.

And what if the strife is of a different nature? Let us suppose, to begin, that the political order in which I am a citizen has enacted laws that assure me healthy living conditions and steady employment. Let us suppose further that, despite those laws, my freedom to contract is deprived because I am sick in bed with severe gastrointestinal disorders because the water I drink is polluted by thousands of other users, large and small, such that I cannot identify a specific agent of my harm? Alternately, I might argue that my freedom to contract is infringed because I live in a distant suburb not well served by affordable, safe transportation alternatives, a situation that does not to admit of a straightforward cause-and-effect explanation. In this situation, there are many possible agents of my harm and causes of my deprived right.

Moreover, I might not understand the causes of my harm, or may lack the information and tools to vindicate my right, although others in my society might have that information and those tools. But a strict reading of the access to justice mechanism contemplated in the theories of classical contractarians like Hobbes and Locke does not address such possibilities.

This analysis seeks to understand if and how classical contract theory would address situations like the two examples above. The analysis argues that these questions are worth asking because examples like the two above and many others like them are increasingly common, resulting not only in the deprivation of basic rights that Hobbes and Locke would recognize (such as the freedom to contract), but also in the deprivation of rights of more recent creation, rights that we today

generally collect under the rubric of collective and diffuse rights.[2] This paper seeks to explore whether classical contract theory provides a workable framework for access to justice in the context of collective and diffuse rights claims—situations in which the culprits are everyone at once, or more frequently, the culprits are no one in particular.

This analysis is undertaken in the belief that any attempt today to try and define what is meant by "access to justice" must take into account collective and diffuse rights that may require vindication. If it turns out that classical contract theory is inadequate to justify the defense of collective and diffuse rights, then it will be necessary to identify other theoretical grounds. Yet as the below analysis argues, while classical contract theory may not provide all of the theoretical architecture necessary to advance and sustain collective and diffuse rights claims, it is nonetheless sufficient to defend the protection of shared interests when they are denied.

In pursuing this analysis, however, I am acutely aware of two risks. The first risk is the danger of anachronism. These thinkers have been widely read to support views wholly outside the context in which they articulated their theories.[3] In the context of a modern discussion of collective and diffuse rights and the applicability of classical contractarian thought to defend them, the concern about anachronism is arguably especially acute. Collective and diffuse rights claims are often used in the service of populations or social groups who have historically been marginalized from mainstream political, social, and economic opportunities.[4] Consequently, such rights claims may prove especially helpful in addressing the widening social and economic inequalities globally.[5] To be sure, concern about what we today call marginalized populations was decidedly not of interest to thinkers like Hobbes and Locke. Hobbes famously acknowledged the poverty that could constitute human existence with his observation that "the life of man" could be

2. *See* Antonio Gidi, *Class Actions in Brazil – A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 349 (2003).

3. *See, e.g.*, JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE 5-8 (1982); JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 8 (1980).

4. *See, e.g.*, Michael R. Geroe & Thomas K. Gump, *Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe*, 32 COLUM. J. TRANSNAT'L L. 673 (1995) (describing the benefits of collective rights measures and the success collective rights measures in protecting minorities in Europe).

5. *See, e.g.*, Ángel R. Oquendo, *Justice for All: Certifying Global Class Actions*, 16 WASH. U. GLOBAL STUD. L. REV. 71, 113-22 (2017) (making claims for the need to be receptive to diffuse rights claims to protect widespread harms, based on mostly Latin American examples); Zeev Segal, *Do Israeli Arabs Have Collective Rights?*, 12 J.L. SOC'Y 94 (2010) (asserting the claim that, by virtue of their special historical, cultural, and political circumstances, Israeli Arabs deserve not only individual but also collective rights recognition).

"solitary, poore, [sic] nasty, brutish, and short."[6] That condition of poverty was also one of equality—equality of human capacity and ability in the state of nature, prior to entering into civil society. As Hobbes explained: "From this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing, which neverthelesse they cannot both enjoy, . . . and in the way to their End, (which is principally their owne conservation, and sometimes their delectation only,), endeavour to destroy, or subdue one an other."[7] However, this world—poor and equal—was one that Hobbes spent the better part of the Leviathan arguing that humans should seek to escape. Thus, Hobbes can hardly be characterized as an advocate for what we today call the principle of equality, which is a principal aim of collective and diffuse rights advocates; this principle was simply not of concern to him.

For Locke, similarly, equality was not positively valued because it violated a divine order that he took pains to establish in the First Treatise.[8] This view may have derived from his own personal circumstances, as an up-and-coming member of the bourgeoise. Peter Laslett, one of Locke's most lucid analysts, observes that Locke detested idleness and, as Laslett writes, "[i]n his published works he showed himself the determined enemy of beggars and the idle poor, who existed, he thought, because of 'the relaxation of discipline and . . . corruption of manners'. He even implied that a working family had no right to expect its children to be at leisure after the age of three."[9]

Thus, it might be considered foolhardy to apply the ideas of classical contract thinkers to reinforce the theoretical foundations for collective and diffuse rights claims. At best, the thought of two leading classical contract thinkers in English, Hobbes and Locke, bears no awareness of

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6. *See* THOMAS HOBBES, LEVIATHAN 89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) [hereinafter HOBBES LEVIATHAN]. For an analysis of the connections and tensions between contractualism and access to justice see Daniel Bonilla Maldonado, *The Right to Access to Justice: Its Conceptual Architecture*, 27.1 IND. J. GLOBAL LEGAL STUD. 15 (2020) and Amnon Lev, *Public Law, Precarity, and Access to Justice*, 27.1 IND. J. GLOBAL LEGAL STUD. 35 (2020). Bonilla's and Lev's articles are in dialogue between them and with this article.

7. *See* HOBBES LEVIATHAN, *supra* note 6, at 87.

8. JOHN LOCKE, *The First Treatise*, *in* TWO TREATISES OF GOVERNMENT § 118, at 245 (Peter Laslett ed., Cambridge Univ. Press 1960) (1689) ("Because in this of *Gen.* 27 *Isaac* foretells that the *Israelites*, the Posterity of *Jacob*, should have Dominion over the *Edomites*, the Posterity of *Esau*; therefore says our *A. Heirs are Lords of their Brethren* . . . .").

9. Peter Laslett, *Locke the Man and Locke the Writer: Introduction* to JOHN LOCKE, *The First Treatise*, *in* TWO TREATISES OF GOVERNMENT 16, 43 (Peter Laslett ed., Cambridge Univ. Press 1960) (1689) (quoting John Locke, *An Essay on Poor* Law, *in* Political Essays 182, 184 (Mark Goldie ed., 1997).

the possible significance of what we today term collective and diffuse rights. At worst, however, these thinkers demonstrated a resistance to the foundational aims of many, if not most, collective and diffuse rights claims, namely to apply equitable arguments in search of more equal social and economic circumstances. One might argue that such hostility would disqualify the consideration of classical contract theory to develop the justifications for collective and diffuse rights claims.

However, in response to such criticism, it is important, I think, to emphasize the way in which classical contract ideas are examined. My point is not to ask what Hobbes, Locke, or any other classical liberal thinker said about collective and diffuse rights or even more basically about modern notions like political, social, and economic equality or the importance of poverty reduction aided by law and the intervention of legal institutions. On the one hand, to ask how classical contract ideas are relevant for building the architecture of modern collective and diffuse rights claims may seem absurd; this was not a rights category available to the canonical rights thinkers in their time. On the other hand, I would argue that it is not absurd to engage in an analysis of some of the foundational thinkers of classical contract theory, and in particular to scrutinize their views about justice access—to the extent we know them—and then to ask what else, if anything, is needed in the architecture of access to justice to provide a solid structure for the defense of collective and diffuse rights.

Two other points are worth making with respect to an analysis of the views of the classical contractualist thinkers in the context of a discussion about collective and diffuse rights. The first such point is that while "collective and diffuse" interests were not an element of the rights idiom of seventeenth-century England, both writers were keenly aware of the need to protect the commonwealth—in other words, to articulate political philosophies that treated individuals not only as citizens, but also individuals as members of the polity, a collective interest. The second point to be made is that, while the collective and diffuse category was unavailable to each author, nothing in either of their philosophies precludes application of their theories to these types of rights. The key thing for each is that for resolution of disputes, an impartial third-party exists to resolve differences. By this logic, it matters not if the interests are individual or collective. Thus, just as the theories of Hobbes and Locke have been successfully applied to economic and social rights[10]—categories far beyond their ken or scope—

10. *See, e.g.*, Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 2 n.8 (2004) (positing Locke's endorsement of children's rights).

so too can they be applied to the analysis of collective and diffuse rights.

The second analytical risk is that it is admittedly somewhat artificial to focus only on Hobbes and Locke. Classical contract theory certainly encompasses more than those two thinkers.[11] The aim of these reflections is modest, namely to advance a contribution to questions of access to justice and identify theoretical gaps that may need elaboration. For my purposes here, Hobbes and Locke are thus proxies for the larger contract theory tradition and its handling of questions of access to justice.

This analysis consists of three principal parts. First, it briefly reviews the classical contract account that explains how and why individuals enter civil society, found in the writings of both Hobbes and Locke. The analysis then examines the limited extent to which classical contract theory treats questions of rights vindication or, in more modern terms, with questions of access to justice. Second, the analysis examines the nature of collective and diffuse rights claims and will make a case for their importance in the modern world. Third, the analysis seeks to identify arguments from the classical account that might be useful in the context of trying to vindicate what we now call collective and diffuse rights. In this connection, this reflection analyzes the possibilities for and limitations of, if any, classical contract theory to accommodate modern collective and diffuse rights claims. Without question, the analysis will thus at times paint with a very broad brush. However, the aim is not to provide an exhaustive analysis of the response (or not) of classical contract theory to the challenge presented by collective and diffuse rights questions, but rather to begin to trace out the relation of classical contract theory to these rights claims, which are of ever-growing importance today.

CLASSICAL CONTRACT THEORY AND RIGHTS VINDICATION

At its most elemental formulation, classical contract theory posits a simple trade-off: men enter civil society, even though it deprives them of their absolute personal liberty, because it is safer than living without its protections in the state of nature. Moreover, the physical safety characteristic of civil society is accompanied by other advantages, including advantages born of political, social, and economic common purpose. When considering the relevance of Hobbesian theory for

11. *See generally, e.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (G. D. H. Cole trans., J. M. Dent & Sons 1973) (1762) (assessing concerns about political practices and encouraging the shift of governing power from the monarchy to the individual sovereign).

advancing collective and diffuse rights claims, this emphasis on common welfare—protection of what he and his contemporaries called the "Common-wealth"[12]—must be judged to be of central importance.

Hobbes

In *De Cive*, Hobbes's masterwork prior to publication of *Leviathan*, he tellingly wrote as follows:

> Outside the commonwealth every man has a right to all things, but on the terms that he may enjoy nothing. In a commonwealth every man enjoys a limited right in security. Outside the commonwealth anyone may be killed and robbed by anyone; within a commonwealth only by one person. Outside the commonwealth, we are protected only by our own strength; within by the strength of all. Outside the commonwealth, no one is certain of the fruits of his industry; within the commonwealth all men are. To sum up: outside the commonwealth is the empire of the passions, war, fear, poverty, nastiness, solitude, barbarity, ignorance, savagery; within the commonwealth is the empire of reason, peace, security, wealth, splendor, society, good taste, the sciences and good-will. [13]

The above passage, which has echoes throughout Hobbes's work,[14] is of interest for at least two reasons in the context of the present analysis.

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12. On this spelling see, for example, *infra* note 16. *See also, e.g.*, AMNON LEV, SOVEREIGNTY AND LIBERTY: A STUDY OF THE FOUNDATIONS OF POWER 7 (2014) ("This is the problem to which Hobbes' political theory offers a solution: his commonwealth which is organized around the contemporaneous genesis of civil order and law is self-contained as a jurisdictional unit and need not refer beyond itself to settle any matter of law."); QUENTIN SKINNER, HOBBES AND REPUBLICAN LIBERTY 147-48 (2008) (including an illustration of the Great Seal of the English Commonwealth).

13. THOMAS HOBBES, ON THE CITIZEN 116 (Richard Tuck & Michael Silverthorne eds., trans., Cambridge Univ. Press 1998) (1642).

14. HOBBES LEVIATHAN, *supra* note 6, at 117-21 (arguing, *inter alia*, that "the Lawes of Nature . . . of themselves, without the terrour of some Power, to cause them to be observed, are contrary to our naturall Passions . . . . Therefore notwithstanding the Lawes of Nature . . . if there be no Power erected, or not great enough for our security; every man will, and may lawfully rely on his own strength and art, for caution against all other men . . . . The only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another . . . is, to conferre all their power and strength upon one Man, or upon one Assembly of men, . . . to beare their Person; . . .

First, it reveals Hobbes's notion of harm, which implies a single cause-and-effect relationship when a right is infringed. This is suggested by the argument that within the commonwealth murder or robbery can be committed against an individual "by only one person."[15] If that is so, it is surely because the crime will trigger the levers of justice against the errant individual. As noted above, a key consideration for Hobbes was to explain the circumstance under which an impartial third party—the sovereign—would be invoked to maintain order as between individuals within the commonwealth. Second, the commonwealth's protection of its members ("within by the strength of all"), along with the assumption that industrious men will be compensated for their labors ("within the commonwealth all men are [certain of the fruit of their industry]") indicates Hobbes' conception of the social contract in operation; individuals become citizens with the expectation of various rights, including protection of their physical and personal wellbeing and the ability to pursue their betterment.[16] Notably, however, in the context of this paper it is worth stressing Hobbes's concern with the strength of the collectivity. At least implicitly, this suggests potential claims in defense of infringements of rights affecting the collective. To be sure, for Hobbes these rights are not without limit. On the contrary:

> [t]he Liberty of a Subject, lyeth therefore only in those things, which in regulating their actions, the Soveraign hath praetermitted: such as is the Liberty to buy, and sell, and otherwise contract with one another; to choose their own aboad, their own diet, their own trade of life, and institute their children as they themselves think fit; [and] the like.[17]

That is, the sovereign chooses what bundle of rights are available in a given civil society.[18] But Hobbes is clear that civil society is accompanied by rights expressed in the form of laws. In the context of

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and therein to submit their Wills, every one to his Will, and their Judgments, to his Judgment.").

15. ON THE CITIZEN, *supra* note 13, at 116.

16. *Id.* at 116; *see, e.g., id.* at 170-76.

17. HOBBES LEVIATHAN, *supra* note 6, at 148.

18. *See id.* Hobbes in fact acknowledges what we would now call an argument in favor of cultural relativism. Elsewhere in *Leviathan*, for example, for example he acknowledges but dismisses for himself the notion of "fundamental" laws to be observed by all civil societies. According to Hobbes, a "Fundamentall Law in every Common-Wealth is that . . . by which Subjects are bound to uphold whatsoever power is given to the Sovereign, . . . without which the Common-wealth cannot stand." *Id.* at 200.

the present discussion, this raises a subsequent question, namely: what if these rights are infringed?

Hobbes had exceptional respect for the sovereign power, especially if it was embodied in a sovereign monarch. He makes clear in *Leviathan* that the price of entering civil society is submitting to the sovereign authority.[19] One cannot object to the sovereign authority because it is the manifestation of one's own choice and identity as a member of a secure civil society. Consequently, he articulates what we now characterize as the doctrine of sovereign immunity: "[W]hatsoever he doth, it can be no injury to any of his Subjects; nor ought he to be by any of them accused of Injustice . . . . [B]y this Institution of a Commonwealth, every particular man is Author of all the Soveraigne doth; and consequently he that complaineth of injury from his Soveraigne, complaineth of that whereof he himselfe is Author; and therefore ought not to accuse any man but himselfe; no nor himselfe of injury; because to do injury to ones selfe, is impossible."[20] As will be seen in Part II, the absolute affirmation of sovereign decisions that these words reflect, such that citizens cannot claim to be harmed by the body they effectively create and constitute, is problematic for modern collective and diffuse rights claims.

This is not to say, however, that Hobbes does not allow for the possibility that a citizen may seek to vindicate a right denied. On the contrary, to maintain the *publique peace* the sovereign possesses "the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects."[21] The *rules*, the laws established by the sovereign, focus first and foremost on the power to contract (always of central importance to Hobbes). Hobbes is clear "that in all kinds of actions . . . men have the Liberty, of doing what their own reasons suggest, for the most profitable to themselves."[22] Even within the commonwealth, for Hobbes, this affords each individual with some

19. *See, e.g., id.* at 122 ("And Consequently they that have already Instituted a Common-wealth, being thereby bound by Covenant, to own the Actions, and Judgments of one, cannot lawfully make a new Covenant, amongst themselves, to be obedient to any other, in any thing whatsoever, without his permission.").

20. *Id.* at 124.

21. *Id.* at 125. As the lawyer says in *Behemoth*, men in themselves are quite incapable of defining what is right and wrong: "Common people know nothing of right or wrong by their own meditation; they must therefore be taught the grounds of their duty, and the reasons why calamities ever follow disobedience to their lawful sovereigns." 6 THOMAS HOBBES, *Behemoth: The History of Causes of the Civil Wars of England, in* THE ENGLISH WORKS OF THOMAS HOBBES OF MALMESBURY 161, 343 (Sir William Molesworth, Bart. ed., Scientia Verlag Aalen 1996) (1839).

22. HOBBES LEVIATHAN, *supra* note 6, at 147.

degree of discretion and freedom of choice, such as "to choose their own aboad, their own diet, their own trade of life, and institute their children as they themselves think fit; [and] the like."[23] To the extent that the quoted language here focuses on well-being, it provides an opening to think about the assertion of what we now call collective and diffuse rights claims. For example, Hobbes understood as essential the need to choose one's own diet.[24] A collective or diffuse rights claim, in the modern context, can be imagined whereby, due to fraud in the use of ingredients or environmental contamination, that need is interfered when depriving me of that right. Clearly Hobbes was not thinking of such group claims, claims based on facts far from his reality. At the same time, however, he was quite clear that the reason to enter into civil society was to provide benefits to the individual, in the form of security of his person, family, and community. Thus, while collective and diffuse claims were not part of his vernacular, the demands they represent can certainly be understood as within the wide circumference of social and economic rights his theory sought to defend.

When one violates a rule and injures another, says Hobbes, a citizen then has recourse to "the Right of Judicature."[25] But Hobbes offers little more with respect to what we now call access to justice. A citizen possesses a right to seek redress for an injury that violates a rule derived from the sovereign authority. The judge of the dispute must be an impartial third party required to decide cases on the basis of facts or established legal principles. As he wrote in *Philosophical Elements on the Citizen*:

> [I]t is the responsibility of the same *Sovereign power* to come up with rules or measures that will be common to all . . . so that each man may know by them what he should call *his own* and what *another's*, what he should call *just* and *unjust* . . . . These rules or measures are normally called the *civil laws* or *laws of the commonwealth* . . . . And CIVIL LAWS . . . are nothing other than commands about the citizen's future actions from the one who is endowed with *sovereign authority* [*summa potestas*].[26]

23. *Id.* at 148.
24. *Id.*
25. *Id.* at 125.
26. ON THE CITIZEN, *supra* note 13, at 79.

To be sure, Hobbes considers the role and responsibilities of judges as impartial executors of the sovereign's commands.[27] But that is not all. The following passage from the *Leviathan*, in the context of a consideration of collective and diffuse rights, is of particular interest:

> The safety of the People, requireth further, from him [i.e. the sovereign], or them that have the Soveraign Power, that Justice be equally administred to all degrees of People; that is, that as well the rich, and mighty, as poor and obscure persons, may be righted of the injuries done them; so as the great, may have no greater hope of impunity, when they doe violence, dishonour, or any Injury to the meaner sort, than when one of these, does the like to one of them: For in this consisteth Equity; to which, as being a Precept of the Law of Nature, a Soveraign is as much subject, as any of the meanest of his People. All breaches of the Law, are offences against the Common-wealth: but there be some, that are also against private Persons.[28]

For purposes of the present discussion, the passage merits attention for at least two reasons. First, the focus on *equity* indicates Hobbes's belief that judicial action should have as a goal redistribution of resources when harm occurs. Second, it is notable that Hobbes understood legal violations to be harms first against the collective and only in the second instance that any such violation may also be against individuals. These reasons are of interest because they both characterize challenges present in the assertion of modern collective and diffuse interest claims.[29] However, the passage continues as follows:

> Those [offenses] that the concern the Common-wealth onely, may without breach of Equity be pardoned; for every man may pardon what is done against himselfe, according to his own discretion. But an offense against a private man, cannot in Equity be pardoned, without the consent of him that is injured; or reasonable satisfaction.[30]

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27. *See, e.g.*, HOBBES LEVIATHAN, *supra* note 6, at 108-09, 125.
28. *Id.* at 237.
29. *See infra* Part II.
30. HOBBES LEVIATHAN, *supra* note 6, at 237-38.

For the assertion of collective and diffuse rights, which often but not exclusively involve public officials, this language is problematic. Since the social contract for Hobbes means that the individual becomes part of the collective—what we would call the "public"—interest, the individual cannot claim against that shared interest. The highly individualistic nature of grievance thus creates an impediment to the assertion of such modern claims if using a Hobbesian analytical framework.

Indeed, Hobbes's view needs to be stressed. One cannot claim an injury by the Sovereign—to make such a claim was, for him, tantamount to saying: "I have injured myself." The nature of the modern administrative state is, of course, vastly different from the reach of the seventeenth-century sovereign. Nonetheless, given the nature and complexity of the modern administrative state, modern collective and diffuse rights' claims often include not merely private transgressions affecting large groups, but also public errors of action and of omission. In this respect, however, even Hobbes provides some theoretical basis for challenges to sovereign authority. This is because the sovereign authority is not absolute. On the one hand, it is true that in Hobbes's political universe subjects cannot advance claims against the sovereign:

> For he that doth any thing by authority from another, doth therein no injury to him by whose authority he acteth: But by this Institution of a Common-wealth, every particular man is Author of all the Soveraigne doth; and consequently he that complaineth of injury from his Soveraigne, complaineth of that whereof he himselfe is Author; and therefore ought not to accuse any man but himselfe; no nor himselfe of injury; because to do injury to ones selfe, is impossible.[31]

This is at odds with the nature of many modern collective and diffuse rights claims, where a claim may be brought as easily against the sovereign as against private parties.[32]

Yet on the other hand, Hobbes also articulates a position that could allow for the defense of a collective or diffuse claim because he identifies absolute limits on sovereign power.[33] "The sovereign may not, he says,

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31. *Id.* at 124.

32. A common collective claim in the United States, for example, concerns challenges to federal and state taxing authority and activity. *See, e.g.*, Charlotte Crane, *Maintaining Class Actions in Tax Cases: Why Have Federal Litigants Been So Much Less Successful?*, 11 PITT. TAX REV. 179, 182-83 (2014) (examining, *inter alia*, questions of sovereign immunity and its limits in such class actions).

33. *See* HOBBES LEVIATHAN, *supra* note 6, at 151.

order me to kill myself or another; the sovereign cannot order me to incriminate myself."[34] Moreover, says Hobbes:

> If the Soveraign command a man (though justly condemned,) to kill, wound, or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live; yet hath that man the Liberty to disobey.[35]

But what about the reverse circumstance? What if, for example, the sovereign is the one responsible for distributing food, air, or water that endangers life, what then? This is not a question Hobbes asked. But it does not press his theory too far into service of a view he could not endorse to suggest that even the staunch defender of sovereign monarchical power would have had qualms about action private *or* public that endangered the well-being of the sovereign's subjects.

Locke

It bears repeating that these reflections need not examine the considerable differences between two thinkers as different as Hobbes and Locke.[36] The aim here is merely to identify the contours of their ideas about access to justice, particularly as they might relate to the advancement of modern collective and diffuse rights claims. For Locke too, the social contract is of central importance.[37] What merits special attention with respect to Locke's theories in this context, however, is the role that property plays in his notion of a well-functioning civil society. To that end, these reflections will concentrate principally on Chapter V of the Second Treatise, which outlines Locke's theory of property. In addition, it is useful briefly to reiterate Locke's understanding of the limits of individual action when one enters into civil society, a key to appreciating what access to justice appears to have meant to him.

The focus on Locke's notion of property is justified here for two reasons. First, Locke demonstrates a considerable interest in the obligations of citizens to one another even as mediated by the property right. In this, he can—somewhat anachronistically—be labeled a defender of what we now know as resource conservation. Inasmuch as

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34. *Id.*

35. *Id.*

36. Although, as John Dunn has demonstrated, the alleged differences between them may be less consequential than is sometimes argued. *See* DUNN, *supra* note 3, at 77-83.

37. Maldonado, *supra* note 6, at 10-11.

collective and diffuse rights typically involve a misuse or misappropriation of resources, this discussion merits attention here. Second, a focus on Locke's conception of property also demonstrates the very different world in which he thought and lived, a world in which resources were still relatively abundant. This fact is of enormous importance in assessing the utility of his thought for theorizing a case for justice access in the case of collective and diffuse rights claims.

Locke demonstrates, in the Second Treatise, a formidable degree of respect for nature, unsurprisingly perhaps given the depth of his Christian faith and belief that all things natural had been created by the Christian God.[38] As he writes: "Nothing was made by God for Man to spoil or destroy."[39] Even when, by one's labor, one creates private property distinct from the common, an individual bears a responsibility to be a good steward of the resources. Thus, Locke declares, "[a]s much land as a man tills, plants, improves, cultivates and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common."[40] Moreover, such labor is a divine obligation: "God, when he gave the World in common to all Mankind, commanded Man also to labour . . . . God and his Reason commanded him to subdue the Earth."[41] However, "subdue" was not for Locke a synonym for exploit mercilessly. As he continued to explain: "i.e. improve it for the benefit of life . . . ."[42]

Despite property being made private through being demarcated or fenced off in some way, and then tilled, planted, improved, and cultivated, such that the property becomes that of he who so manages it, Locke insists that private property ownership in and of itself does not result in resource exploitation. Resources in his world are abundant and exist only to satisfy necessities. Conflict over their use is not contemplated by Locke:

> No Body [sic] could think himself injur'd by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst. And the Case of Land and Water, where there is enough of both, is perfectly the same.[43]

38. LOCKE, *The Second Treatise of Government*, supra note 8, § 31, at 308.
39. *Id.*
40. *Id.* § 32, at 309.
41. *Id.*
42. *Id.*
43. *Id.* § 33, at 309.

At this point, Locke's argument encounters a tricky turn due to, as he acknowledges, two factors, namely "money and commerce." Money and commerce enable some to purchase more than others, and the fact that as population grows and land is appropriated by some, what is left may be less desirable: "the remainder, after such inclosure, would not be as good to the rest of the Commoners as the whole was, when they could all make use of the whole: whereas in the beginning and first peopling of the great Common of the World, it was quite otherwise."[44] As Locke explains it, before money, commerce, and population growth, there was enough to go around. But money has the effect, he acknowledges, to alter "the intrinsick value of things, which depends only on their usefulness to the Life of Man."[45] The challenge for Locke then becomes how to square this new potential for acquisitiveness with his insistence that in a divinely ordered world resources will be sufficiently distributed for those who labor, and also that nothing in God's creation can by man be spoiled or destroyed.

Locke resolves this challenge by insisting that injustice is avoided nonetheless because those who labor mightily will never want. Even with what "[m]en had *agreed, that a little piece of yellow Metal*, which would keep without wasting or decay," a thing that can be valued the same as "a great piece of Flesh, or a whole heap of Corn," Locke insists, not entirely satisfactorily, that injustice is avoided because, after all, "[m]en had a Right to appropriate, by their Labour, each one to himself, as much of the things of Nature, as he could use: Yet this could not be much, nor to the Prejudice of others, where the same plenty was still left, to those who would use the same Industry."[46]

If Locke's treatment of the inequality produced by the introduction of money-based commerce (a phenomenon of which he was mightily aware)[47] is rather breezy and sometimes shallow, the comment is nonetheless of interest for how he understood the natural world and the limits of property. Quite unlike our modern view of resources being limited, Locke's worldview, reflected in the language quoted above,

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44. *Id.* § 35, at 310.

45. *Id.* § 37, at 312.

46. *Id.*

47. Lev, *supra* note 6, at 10. However, it need be remembered that the world in which Locke lived still was not dominated by money and commerce as we know it: "[Y]et there are still *great Tracts of Ground* to be found, which . . . *lie waste*, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common. Tho' this can scarce happen amongst that part of Mankind, that have consented to the Use of Money." LOCKE, *The Second Treatise of Government*, *supra* note 8, § 45, at 317 (italics in original). The inequality triggered by the growing use of money and dependence on commerce, he makes clear subsequently, is based on the "tacit and voluntary consent" of all men. *Id.* § 50, at 320.

reveals quite the opposite position. For Locke, access to resources was not the issue. Like Hobbes, he was closer to a world of self-sustenance than we, and for him the question was not resource availability, but rather taming and manipulating wild and unproductive nature for human betterment. As he wrote in words now quoted by virtually every Anglo-American teacher of common law property:

> [T]hat he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind. For the provisions serving to the support of humane life, produced by one acre of inclosed and cultivated land, are (to speak much within compasse) ten times more, than those, which are yielded by an acre of Land, of an equal richnesse, lyeing wast in common.[48]

However, in a discussion of the consequences of Lockean theory for collective and diffuse rights claims, it is also worth quoting the language that both precedes and that follows his famous quote. Before articulating what we now label the Lockean "labor theory of value,"[49] Locke made clear his view that individual resource use was conditioned upon leaving enough for other members of the collective:

> Men had a Right to appropriate, by their Labour, each one to himself, as much of the things of Nature, as he could use: Yet this could not be much, nor to the Prejudice of others, where the same plenty was still left, to those who would use the same Industry. To which let me add, that he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind.[50]

Moreover, Locke concludes this section by expressing a concern that improvement and cultivation be directed not just to individual benefit, but also to reduce the misery of all:

> For I aske whether in the wild woods and uncultivated wast of America left to Nature, without any improvement, tillage or husbandry, a thousand acres

48. LOCKE, *The Second Treatise of Government*, *supra* note 8, § 37, at 312.

49. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 536 nn.22-23 (2005).

50. LOCKE, *The Second Treatise of Government*, *supra* note 8, § 37, at 312.

> will yield the needy and wretched inhabitants as many conveniencies of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated?[51]

In the context of discussing the capacity of Lockean theory to embrace collective and diffuse rights claims, his focus on the value of assuring life's "conveniences" for the "needy and wretched" merits attention.[52] Again, the social contract, though—as in Hobbes—understood as a relation between individual and sovereign, has a decidedly larger, extra-individual social purpose.

For Locke, moreover, in the state of nature, "[b]efore the Appropriation of Land," individuals have a responsibility not to waste. In the state of nature, says Locke, if hunted animals "perished, in his Possession, without their due use; if the Fruits rotted, or the Venison putrified, before he could spend it, he offended against the common Law of Nature, and was liable to be punished; he invaded his Neighbour's share, for he had *no Right, farther than his Use* called for any of them, and they might serve to afford him the Conveniencies of Life."[53]

But even after "the *Possession of Land*," individuals for Locke remained responsible not to waste:

> The same *measures* governed . . . : Whatsoever he tilled and reaped, laid up and made use of, before it spoiled, that was his peculiar Right; whatsoever he enclosed, and could feed, and make use of, the Cattle and Product was also his. But if either the Grass of his Inclosure rotted on the Ground, or the Fruit of his planting perished without gathering, and laying up, this part of the Earth, notwithstanding his Inclosure, was still to be looked [upon] as Waste, and might be the Possession of any other. [54]

Moreover, irrespective of the state in which individuals find themselves, Locke is conscious of the need to commit no harm, either to another or to all others.[55] Even prior to the widespread use of money, for example, he says that if a man:

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51. *Id.*
52. *Id.*
53. *Id.* § 37, at 313.
54. *Id.* § 38, at 313.
55. *See id.* § 46, at 318.

> [A]lso bartered away Plumbs that would have rotted in a Week, for Nuts that would last good for his eating a whole Year, he did no injury; he wasted not the common Stock; destroyed no part of the portion of Goods that belonged to others, so long as nothing perished uselessly in his hands.[56]

Thus, for Locke, the imperative to steward resources carefully forms a central part of his vision.[57] This is true for him with respect to human beings at any stage of development—from the state of nature on. In short, the need to not harm the interests of others constitutes a central concern of his theory.

As will be seen in Part III, while these considerations can hardly be understood to defend a principle of access to justice for the assertion of collective and diffuse rights as we understand those words today, they provide important grounds to use Lockean theory in the defense of collective and diffuse claims. Nonetheless, it would be a wild exaggeration to suggest that Locke advanced a collectivist notion of access to justice. For him, "*Justice* gives every Man a Title to the product of his honest Industry."[58] This idea encapsulates his contractarian idea: labor produces a right in property and a violation of the title in that property entitles an *individual* who believes he has been harmed to seek vindication of the right. Such a concept does not, at first blush, allow room for asserting rights to things one has not labored to produce—clean air and water, for example. Moreover, the notion of who can assert claims is clearly limited to those who have labored; indeed, Locke takes pains to identify the ownership rights in the products of natural resources with great specificity: "[T]he bread belongs naturally to the baker, the timber to the timberman, the leather to the tanner, and so on."[59] As Tully emphasizes, this leads to the conclusion for Locke that "[t]he conventional arrangements for payment can thus be made in accordance with the natural principle of justice: every man has a title to the product of his honest industry."[60]

On its face, such a notion would appear to leave little room for one seeking justice on another's behalf or to suggest some notion of ownership or even possession where labor is not involved, as is required

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56. *Id.*

57. *See id.*

58. LOCKE, *The First Treatise*, *supra* note 8, § 42, at 188. This statement is quoted by Tully, TULLY, *supra* note 3, at 118, who calls this "a first principle of justice" for Locke.

59. TULLY, *supra* note 3, at 145; *see also* LOCKE, *The Second Treatise of Government*, *supra* note 8, §§ 42-44, at 315-17.

60. TULLY, *supra* note 3, at 145.

for the successful assertion of some collective or group claims today. However, the strong emphasis on respecting natural creation and the imperative not to despoil it to the harm of others is also a central part of Locke's thinking, as shown. This too must be remembered. In other words, while Locke—like Hobbes before him—was in the first instance focused on exploring the individual's role in civil society, especially apropos the sovereign, he was also fundamentally interested in showing what unites individuals in a commonwealth. Given that fact, it is not a far cry to acknowledge that the theory can, within limits, support modern claims for collective and diffuse rights. Importantly, Locke's theory provides a theoretical justification for such claims beyond that of Hobbes. Famously, Locke's rejection of Sir Robert Filmer was in part a rejection of Filmer's belief that an "absolute monarch" was entitled to exercise "his right of sovereignty over his undifferentiated possessions in accordance with nothing but his 'unbounded will.'"[61] Instead, Locke's defense of the ultimate rightness of divine creation and natural law allows him to shift focus on collective decisions for the common good. For Locke, men abandon the freedom of the state of nature for "[t]he great and *chief end* . . . of Mens uniting into Commonwealths," namely "*the Preservation of their Property.*"[62] Thus, by contrast to Hobbes, Locke's theory does not clearly explore the limits of sovereign authority. The focus on ends rather than means, in the context of consideration of collective and diffuse rights claims, thus allows for a theoretical justification for claims that harm property irrespective of the status of the actor. Indeed, in the famous last paragraphs of *The Second Treatise*, Locke makes clear that even in a monarchy, "in a matter where the Law is silent, or doubtful, and the thing [should] be of great Consequence, I should think the proper *Umpire*, in such a Case, should be the Body of the *People.*"[63] I do not mean here to suggest that this is a robust defense of collective and diffuse rights claims. To say so would be, once again, anachronistic. I do suggest, however, that this ample language provides a solid basis for such claims, which often proceed in cases where the law is silent or doubtful and where the people's well-being is compromised.

To explore the consequences of these assertions further, it is important briefly to explore what exactly is meant by the phrase collective and diffuse rights. I now turn to that question.

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61. *Id.* at 57.
62. LOCKE, *The Second Treatise of Government*, *supra* note 8, § 124, at 368-69.
63. *Id.* § 242, at 445.

COLLECTIVE AND DIFFUSE RIGHTS

The phrase collective and diffuse rights refer to any situation that "affects an identifiable group of people (collective interests) or a nondeterminable group of people (diffuse interests)."[64] Thus:

> [A] *collective* right is possessed by a group whose members are linked to each other (or to the class opponent) by a pre-existing legal relationship. . . . Because the nature and character of pre-existing legal relationships are often ascertainable, it should not be too difficult--at least theoretically--to identify members of a group having a collective right. Members of such a group are expected to be more cohesive because often all members contracted with the same business organization (the class opponent).
>
> In contrast, a *diffuse* right is possessed by a group whose members are linked not by a common legal relationship but only by the facts of a particular transaction or occurrence. Such a group is usually larger, less cohesive and its members often are not as easily identifiable.[65]

For example, a collective right would be at issue "when a bank, a credit card company or a school charges excessive or illegal fees to its clients, or a health insurance company refuses to cover treatment for some diseases . . . ."[66] By contrast, a diffuse right would be implicated when a chemical plant exploded, sending plumes of toxic material into the air and affecting people and environmental resources over an entire region.

Four factors help account for the increasing importance of collective and diffuse rights claims as a category over the past two centuries. First, industrialization has increased the possibility of environmental harms, such as contamination of air, water, and soil, which can have damaging effects on human and plant health. Second, exponential population growth during this period means that more people are living ever more densely together—increasing their joint risk from human-made and natural harms. Third, and related to each of the prior factors,

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64. Enrique González Mac Dowell, *Judicial Action for the Protection of Collective Rights and Its Legal Impact: A Case Study*, 30 J.L. MED. & ETHICS 644, 644 (2002).

65. Robert A. Weninger, *The VW Diesel Emissions Scandal and the Spanish Class Action*, 23 COLUM. J. EUR. L. 91, 111 (2016).

66. Antonio Gidi, *supra* note 2, at 356.

is the factor of urbanization. In 2008, for the first time in global history, a majority of the world's residents were classified as urban, a trend that promises only to continue.[67] Indeed, one feature of urbanization that distinguishes urban populations from those of prior generations is that more people than ever before are unknown to others where they live out their lives. This means that—as indicated by the above examples of collective harms—the possibility for fraudulent actions committed by actors against large swaths of populations is greater than ever before. This reality leads to the next factor, namely the move to an almost entirely transactional economy, in which people are not responsible for producing the food they consume, making their own clothing and daily necessities, or constructing their own dwellings. As a result, this factor creates the potential for more widespread harms to large groups of people as consumers. Taken together, these factors create conditions requiring legal categories like collective and diffuse rights.

All these factors, of course, did not begin to profoundly shape life in Europe until well after the death of classical contract theorists like Hobbes and Locke. One changing feature that marked their world was, however, the shift from a barter economy to a transactional economy. Each philosopher focused extensively on the implications of this shift to currency-dependence in peoples' lives and its effects on the development of civil society. At a minimum, this development anticipates and triggers many of the rights challenges that characterize our era, challenges that Hobbes or Locke could scarcely have imagined.

The enforcement of collective and diffuse rights questions is bedeviled by several concerns. As with most "class action" devices, the principal questions concern class membership and timing.[68] With respect to membership, the central question involves determining who has been affected. In the case of a collective action involving the examples given above—of charging high or illegal fees to clients—this is easy enough since the status of a client determines membership in a class. This is more complicated, however, in the case of an environmental harm that damages a specific place, such as a contained toxic spill. This question is equally complicated unraveling the case introducing defective merchandise into the stream of commerce, in which a wide range of loosely connected players share responsibility for

67. UNITED NATIONS POPULATION FUND, UNFPA STATE OF WORLD POPULATION 2007: UNLEASHING THE POTENTIAL OF URBAN GROWTH 1 (2007), https://www.unfpa.org/sites/default/files/pub-pdf/695_filename_sowp2007_eng.pdf.

68. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 753 (2013) (discussing challenges of timing); Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2360-61 (2015) (discussing challenges of defining class membership).

creating the harm. This is to ask, for example, whether only workers at a plant at which a toxic spill occurred can be considered members of the collective, or whether that circle can be widened to include other professions (e.g., fisherman whose catch is poisoned by a spill), or even to those who lived near the site of the spill. At this point, the questions of class membership reveal the overlap between affected parties with both collective and diffuse interests, as the potential to widen the circle of those with affected diffuse interests can be great. For purposes of defining members to a class of diffuse interests, moreover, there are complicated questions of causation.[69] Suppose I have a chronic pulmonary condition that is aggravated by a toxic air plume of chlorine gas. In that instance, disentangling the cause of my harm can be considerable. Similar challenges occur with respect to timing.[70] In the U.S., for example, many statutes of limitations for contract fraud expire within three years of the fraudulent act. While the statutes typically don't expire until three years after the fraudulent harm is *discovered*, what if the symptoms of an environmental harm are suspected but not confirmed until years after the event?

Similarly, what if the symptoms of an environmental harm are suspected but not confirmed until years after the event? Moreover, even in the immediate aftermath of a relatively straightforward infringement of a collective interest—say an event involving a discrete set of clients whose shared financial interests are defrauded—timing questions and concerns include the question of how quickly after an event an individual must declare their interest to be included in the class.[71] As will be explored in Part III below, these issues are neither well addressed by classical liberal theory nor by the principles of access to justice that follow from them, notably with respect to the form in which the right is vindicated.

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69. *See, e.g.*, David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563-73 (1987).

70. *See* LOCKE, *The Second Treatise of Government*, *supra* note 8, § 124, at 368-69.

71. There is a vast periodical literature exploring the consequences of such rules. *See, e.g.*, Elizabeth Cosenza, *Dura-tion: A New Paradigm for Construing the Statute of Limitations in Securities Fraud Class Actions*, 62 BAYLOR L. REV. 681, 683, 686-87 (2010); Joshua D. Ratner, Comment, *Stockholders' Holding Claim Class Actions Under State Law After the Uniform Standards Act Of 1998*, 68 U. CHI. L. REV. 1035, 1037 n.16 (2001) (discussing different standards for triggering statutes of limitations as between U.S. state and federal courts).

EXPLANATORY POWER OF CLASSICAL CONTRACT ARGUMENTS IN DEFENSE OF COLLECTIVE AND DIFFUSE RIGHTS

Clearly, collective and diffuse rights claims address social and economic challenges in a world that classical contract theorists like Hobbes and Locke could not have imagined. The social and political strife they knew was produced by conflicts like those between adherents of the divine right of kings versus believers in (typically divinely ordered) constitutional order and parliamentary power. The nature and causes of such conflicts are of an entirely different order than those that might produce a collective or diffuse rights claim. Nonetheless, collective and diffuse rights claims, if left unable to be vindicated, could result in mass political and social strife that thinkers like Hobbes and Locke *would* have recognized, to their horror. Consider, for example, the dislocation of large numbers of people from their livelihoods and displacement and insecurity of those persons as a result of a toxic spill. As suggested in Part I, while it was not the central aspect of either Hobbes's or Locke's thought, both of them were interested in the benefits and consequences of entering into the common-wealth, a form of collective interest. Additionally, they were interested in defining what the conditions were for individual membership in and adherence to the rules of a polity. Maintaining the collective, and respecting not only individual liberties but also collective order and the dignity of all members in the collective mattered to both thinkers. This fact suggests that at a minimum, classical contract thought may give some support to the legal architecture needed to assert successful collective and diffuse rights claims. Therefore, this Part will conclude these reflections with an assessment of the explanatory power, if any, of classical contract theories for access to justice in the service of collective and diffuse rights claims.

In fact, upon review, it may be said that classical contract theory contains the seeds for successful assertion of collective and diffuse rights claims, including features that support, at both an aspirational and a conceptual level, ideas like collective and diffuse claims. Lev reminds us that for Hobbes, worried as he always was by the possible reignition of unrest leading to civil war, government was needed exactly because of the inherent tension between self-interest and common good, such that government existed to protect the latter from the unbridled exercise of the former.[72] In the case of Locke, as discussed above, the

72. *See* SOVEREIGNTY AND LIBERTY: A STUDY OF THE FOUNDATIONS OF POWER, *supra* note 12, at 65 ("Hobbes goes on to explain . . . the opposition of self-interest and common good. As the common people care not for the common good of society, they renounce their part in government. Having grown tired of attending the public courts, 'as dwelling far

pre-eminent concern was the preservation of property and the individual and collective well-being that accompanies it. To that end, Locke placed focus on the power given from "the People" to society and what this meant in terms of the community impact and the expanse of authority vested in the legislature.[73]

Admittedly, for both classical contract theorists examined here, while they recognized and discussed the political, social, and economic role of collective interests and property,[74] there is no identified judicial or dispute resolution mechanism for collective action when those goods are infringed upon or denied. However, it must be remembered that neither theorist was terribly specific about the particular contours of what we now know as access to justice. Rather, what mattered to them was the insistence that justice can be granted only when conflicts are decided by impartial third parties. Thus, on the challenging questions of collective or diffuse rights claims, class membership, or the timing for the opening and closing of the class, their theories leave us without the conceptual tools to build a solid theoretical defense of the claims. Moreover, for both thinkers, when an interest is denied, the recourse to an impartial third party is conceived as an action taken by an individual to assert a claim in that individual's defense when a right has been violated. Given the dominance and longstanding influence of classical contract theory in Western political life and practice, it is perhaps no surprise that in so many different nations and contexts, standing rules stress the importance of an aggrieved individual asserting their claim, a requirement that presents significant challenges for the successful assertion of collective and diffuse rights claims. In the case of claims asserted on behalf of persons who either do not have the information or technical knowledge and tools, much less the financial and personal resources, to advance individual claims, this fierce adherence to an individualist position has proven debilitating to collective and diffuse theories.

Furthermore, as discussed in Part I, for both Hobbes and Locke, the sovereign is the source of the laws that establish the rules according to which civil society operates. To advance any sort of collective or diffuse

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off', or preferring to dedicate themselves to their own affairs, the members of the commonwealth assemble again, this time only to institute a restricted form of government by which they are absolved from the burden of exercising sovereignty.").

73. *See, e.g.*, LOCKE, *The Second Treatise of Government*, supra note 8, § 243, at 445-46.

74. *See, e.g.*, HOBBES LEVIATHAN, *supra* note 6, at 119-21; *id.* at § 89, at 343 ("Where-ever therefore any number of Men are so united into one Society, as to quit every one of his Executive Power of the Law of Nature, and to resign it to the publick, there and there only is a *Political, or Civil Society*. And this is done where-ever any number of Men, in the state of Nature, enter into Society to make one People, one Body Politick under one Supreme Government . . . .").

interest claim, this feature of their thought is problematic, since as the modern world demonstrates, the sovereign is frequently a source of collective and diffuse harms.[75] Hobbes's theory is especially problematic, given his strong conviction in the rightness of an absolute monarchy, whose decisions as to what constitutes right and wrong may not be criticized once selected. In the case of Locke, his theory permits greater flexibility in this regard, since he favors a constitutional monarchy, and, therefore, the legislature may have greater powers to limit the authority and permit orderly dissent—and thus to permit vindication of rights even against the sovereign.

Yet as also argued above, with respect to this faith in sovereign powers, for neither thinker was that authority absolute, especially when it challenged the peace and order, broadly conceived, of the commonwealth—in the most literal sense of that word. More positively, there are aspects of the theories of both classical contract theorists that could be used to construct a more solid architecture to support collective and diffuse rights claims. While each philosopher evinces a contractarian notion of right vindication by which the harmed individual only has the right to pursue an equitable claim, as I have attempted to indicate here, the arc of their arguments also suggests openings to begin thinking about the underlying justifications for collective and diffuse claims. Their work does this in three principal respects.

First, both philosophers demonstrate great respect not only for individual rights to the products of one's labor, but also for the need to protect the common-wealth. As Hobbes famously wrote in Chapter XXIV of *Leviathan*: "For where there is no Common-wealth, there is . . . a perpetuall warre of every man against his neighbor . . . ."[76] Hobbes makes it clear that the common-wealth is characterized by laws established by the sovereign and particularly those that distribute "materials" forming what we know as property rights.[77] The sovereign's decisions cannot be challenged, but it is crucial to remember that even the sovereign, in the Hobbesian worldview, was subject to God's laws and to the law of nature in a Christian polity. The sovereign's power was thus not absolute.[78] The sovereign is responsible, for example, for

75. Consider, for instance, the problem of unregulated air pollution. Only the sovereign has the power to reduce a harm that is generated by most members of a society. Thus, the sovereign is both source of and the possible solution to such harms.

76. HOBBES LEVIATHAN, *supra* note 6, at 171.

77. *Id.* at 171-75.

78. *See* HOBBES LEVIATHAN, *supra* note 6, at 231; JOHN HOBBES, DE CIVE: PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY 97-98 (Howard Warrender ed., Oxford Univ. Press 1983) (1642).

focusing on the interests of the whole and not favoring any one member of the polity.[79] This belief provides another principle useful in conceptualizing and defending a defense of the notion of access to justice for collective and diffuse rights.

For his part, Locke allows for dissolving the constituted governmental authority because "no Man or Society of Men, having a Power to deliver up their *Preservation*, . . . to the Absolute Will and arbitrary Dominion of another . . . ."[80] Indeed, says Locke, men can always act "to rid themselves of those who invade this Fundamental, Sacred, and unalterable Law of *Self-Preservation*, for which they enter'd into Society."[81] Thus, "Locke provides a justification, not of private property, but, rather, of the English Common."[82] Though an oblique defense, it is nonetheless a defense of a notion of shared interests that merit protection. This provides yet another factor that could be decisive in a theoretical defense, consistent with classical contract theory, of what we now call collective and diffuse rights.

Second, both Hobbes and Locke demonstrate a deep respect for God's creation. Hobbes, for example, in *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, makes clear the moral basis of law according to Christian principles.[83] Part of the exchange between a student—a Lawyer—and a Philosopher, goes as follows:

> L[awyer]: . . . I find a great fault in your definition of law; which is, that every law either forbiddeth or commandeth something. It is true that the moral law is always a command or a prohibition, or at least implieth it. But in the Levitical law, where it is said that he that stealeth a sheep shall restore fourfold, what command or prohibition lieth in these words?
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> P[hilosopher]: Such sentences as that are not in themselves general, but judgments; nevertheless, there is in those words implied a commandment to the judge, to cause to be made a fourfold restitution.[84]

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79. DE CIVE, *supra* note 78, at 157.

80. LOCKE, *The Second Treatise of Government*, *supra* note 8, § 149, at 385.

81. *Id.*

82. TULLY, *supra* note 3, at 130.

83. *See* HOBBES, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, *supra* note 21.

84. *Id.* at 28-29.

In the context of this analysis, the exchange is of interest for three reasons. The first of these is that the moral command is the basis for a legal judgment. Even for the authority—respecting Hobbes, actions that violated what we today conceive of as human rights form the basis of law. The second of these is that the Levitical principle—the example selected by Hobbes—demonstrates a recognition that resources need to be husbanded with care and, if they are not, suffer the draconian Biblical punishment. Finally, and third, even judges, normally subordinate to the sovereign, are bound to follow commandments superior to the interests of individual actors, even an actor who is a sovereign. All three reasons could be used to buttress an architecture to defend the notion of collective and diffuse rights.

The third and final respect in which the works of Hobbes and Locke help us to begin thinking about the underlying justifications of collective and diffuse claims is in their emphasis on equity. In the same *Dialogue* discussed above, the Philosopher (who has the answers and we can assume stands in for Hobbes) stresses that "the common-law is nothing else but equity."[85] As discussed in Part I, the idea that he should so emphasize *equity*, or the rightful redistribution of entitlements as the ultimate purpose of the common law and not some other goal (e.g., public order, retribution, punishment) also holds promise for constructing a legal foundation for the robust defense of collective and diffuse rights claims. Moreover, one should never forget in Hobbes his view that "the safety of the people is the highest law."[86] While it would be anachronistic to define "safety" as more than the desire for public peace and order so that individuals were secure in their persons and possessions, the view also helps point toward a principle to help secure access to justice for collective and diffuse rights claims. That is, "safety" could serve as a principal justification to combat mass financial fraud, consumer harms, and environmental harms.

Fourth and finally, it merits reflecting on Locke's view of money as a key driver for law. Men in society got on well in the Lockean world prior to the invention of specie. The inequalities and avarice money introduced necessitated stricter controls on human behaviors. Many of the harms that have given rise to collective and diffuse rights claims, similarly, from financial swindles to toxic contaminations, result from the same human impulse to exploit. Locke's justification for the social contract, therefore, can also be used in the service of an architecture to support collective and diffuse rights claims.

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85. *Id.* at 58.
86. *Id.* at 70.

CONCLUSION

As stressed at the outset of this analysis and several times in this text, collective and diffuse rights claims were not concepts available to the classical contract theorists. To suggest otherwise would be anachronistic in the extreme. Moreover, as the above reflections have endeavored to show, many of the assumptions of their worlds were entirely different than those of our political discourse and social reality, from the foundational beliefs in a Christian polity to an understanding of a natural world blessed with unlimited resources. Nonetheless, as also indicated above, aspects of their thought provide solid theoretical justifications that can be used in the articulation of a more solid architecture in the defense of collective and diffuse rights claims, which can be widely vindicated when breached. However, as also argued here, to do so requires rejecting key elements of the classical contractarian understanding, such as the focus on defending a limited and highly individualistic vision of rights vindication.

Conversely, the contra-egalitarian impulses of Hobbes and Locke need be recognized when undertaking any effort to apply their theories in the collective and diffuse rights context. As argued at the outset, and despite differences in their thought, these impulses constitute key baseline assumptions on which their ideas are constructed and from which they are elaborated. Such assumptions conflict with aims central to collective and diffuse rights claims, to the extent that such claims aim to promote, through equitable redistribution of opportunities, great political, social, and economic equality. Thus, any such effort to use aspects of their theories must squarely face this limitation and measure its dimension. If contract theory is to retain explanatory power for our notion of access to justice, it is essential to sort these matters out. The potential to assert collective and diffuse rights claims needs be increasingly available in our evermore crowded, industrialized, urbanized, and dirty world, one in which individuals and communities are often far removed geographically and socially from those whose decisions shape their lives. This analysis therefore has endeavored to argue that two of the leading contractarian theorists' ideas do not preclude the assertion of such claims. Indeed, a careful reading of the classical contractarians points us in a possible direction, while also identifying some features of their theories that may no longer have robust explanatory power for our current reality.